D.P.U. 88-265

Request for review pursuant to G.L. c. 164, § 56D of power purchase contracts between Newbay Corporation as seller and Braintree Electric Light Department, Groton Electric Light Department, Hingham Municipal Lighting Plant, Holden Municipal Light Department, Littleton Electric Light Department, Middleborough Gas and Electric Department, Middleton Municipal Light Department, North Attleboro Electric Department, Princeton Municipal Light Department, Shrewsbury Electric Light Plant, and Taunton Municipal Lighting Plant, respectively, as buyers.

APPEARANCES: Kenneth Barna, Esq.
Rubin and Rudman
50 Rowes Wharf
Boston, MA 02110
FOR: ELEVEN MASSACHUSETTS MUNICIPAL LIGHT DEPARTMENTS
Petitioners

L. Scott Harshbarger, Attorney General
By: George B. Dean
Assistant Attorney General
Office of the Attorney General
Chief, Regulated Industries Division
131 Tremont Street, 3rd Floor
Boston, MA 02111
Intervenor

Jeffrey B. Pine, Attorney General
By: Patricia M. French
Special Assistant Attorney General
Department of the Attorney General
72 Pine Street
Providence, R.I. 02903
Intervenor

Robert H. Russell, Esq.
62 Summer St.
Boston, MA 02110
FOR: CONSERVATION LAW FOUNDATION OF NEW ENGLAND, INC.
Intervenor

Alan Nogee
Energy Program Director
29 Temple Place
Boston, MA 02111
FOR: MASSACHUSETTS PUBLIC INTEREST RESEARCH GROUP
Intervenor

David S. Rosenzweig, Esq.
Keohane & Keegan
21 Custom House St.
Boston, MA 02110
FOR: NEWBAY CORPORATION
Intervenor

R. Daniel Prentiss, Esq.
R. Daniel Prentiss & Associates
170 Westminster St.
Suite 1000
Providence, R.I. 02903
FOR: BLACKSTONE PARK IMPROVEMENT ASSOCIATION
Intervenor

Irving Brodsky
City Solicitor
60 Eddy St.
Providence, R.I. 02903
FOR: CITY OF PROVIDENCE, RHODE ISLAND
Intervenor

J. William W. Harsch, Esq.
170 Westminster St.
Providence, R.I. 02903
FOR: WARWICK LAND COMPANY
Intervenor

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ORDER ON STANDARD OF REVIEW UNDER G.L. c. 164, § 56D

I. INTRODUCTION

On May 11, 1993, the Department of Public Utilities ("Department") issued a notice ("Hearing Notice") soliciting briefs and/or comments regarding the standard of review to be applied by the Department under G.L. c. 164, § 56D relative to the approval of municipal contracts for the supply of electric power.[1] The hearing officer granted limited participant status to all petitioners to intervene for the purpose of filing comments (May 11, 1993 Hearing Notice at 2).

G.L. c. 164, § 56D generally requires municipal light commissions to conduct competitive bidding for contracts equal to or in excess of $10,000. This requirement does not apply to contracts for the supply of electricity, but provides that the Department shall approve such contracts. Specifically, § 56D provides:

> . . . This section shall not apply to contracts for the supply of electricity to a municipal plant except that such contract shall be subject to the approval of the department of public utilities. Said department may, upon its own initiative, where such contract is for a period longer than three years, after notice and a public hearing, make such order relative to the rates, prices and charges covered by such contract as it deems the public interest requires.

Briefs and/or comments were submitted by the following: the Attorney General of the Commonwealth of Massachusetts ("Massachusetts Attorney General"); the Conservation Law

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[1] The Department originally issued the Hearing Notice on May 4, 1993. A corrected notice was issued on May 11, 1993.

Foundation ("CLF"); Newbay Corporation ("Newbay"); the petitioners, eleven Massachusetts Municipal Light Departments [1] ("Municipals") with proposed contracts with Newbay Corporation; the Massachusetts Executive Office of Environmental Affairs ("EOEA"); [2] and the Attorney General of the State of Rhode Island ("Rhode Island Attorney General"). The Municipals and Newbay filed reply briefs in response to the Massachusetts Attorney General's comments. The Massachusetts Public Interest Research Group ("MASSPIRG") did not submit comments in response to the briefing notice but stated that the proposed purchase is inconsistent with the Department's least-cost planning principles (MASSPIRG Petition to Intervene, May 25, 1993).

Briefs and comments on the same issues were solicited simultaneously in another docket, Taunton Municipal Lighting Plant, D.P.U. 91-273/92-273, since the petitioner in that case had also submitted a power purchase contract to the Department for review under § 56D. Although the Massachusetts Attorney

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[1] The eleven municipal light departments are: Braintree Electric Light Department; Groton Electric Light Department; Hingham Municipal Lighting Plant; Holden Municipal Light Department; Littleton Electric Light Department; Middleborough Gas and Electric Light Department; Middleton Municipal Light Department; North Attleboro Electric Department; Princeton Municipal Light Department; Shrewsbury Electric Light Plant; and Taunton Municipal Lighting Plant.

[2] The EOEA did not file a petition to intervene. However, on June 17, 1993, the EOEA submitted comments with respect to the standard of review under G.L. c. 164, § 56D to the Department. The Department accepted these comments for the purpose of determining its standard of review under G.L. c. 164, § 56D.

General is an intervenor in D.P.U. 91-273/92-273, the only two parties submitting briefs in that docket were Taunton Municipal Lighting Plant, the petitioner, and Silver City Energy Limited Partnership, the seller under the proposed contract. The Department hereby determines that since D.P.U. 88-265 is the earliest open docket in which the G.L. c. 164, § 56D standard of review is at issue and the issue is most fully briefed in this docket, it is most appropriate to issue an Order on the standard of review in D.P.U. 88-265[2].

II. POSITIONS OF THE PARTIES

A. Introduction

The May 11, 1993 Hearing Notice presented eleven issues as a framework for comments submitted by the petitioners and limited participants.[3] A summary of each commenter's position on the

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[2] On March 18, 1994, the Municipals filed an offer of settlement and termination of proceedings in D.P.U. 88-265. In assessing the reasonableness of an offer of settlement, the Department reviews the entire record as presented in the filing and the record in the case to ensure that the settlement is consistent with the public interest. Massachusetts Electric Company, D.P.U. 92-217-A, at 4 (1993), citing, Massachusetts Electric Company, D.P.U. 92-217, at 7 (1993); Boston Edison Company, D.P.U. 91-233, at 5 (1992); Western Massachusetts Electric Company, D.P.U. 92-13, at 7 (1992); Massachusetts Electric Company, D.P.U. 91-205, at 4 (1991); see also Tenaska Mass, Inc., D.P.U. 91-200, at 5 (1993). The Department is issuing an Order on the offer of settlement and termination of proceedings today.

[3] The May 11, 1993 Hearing Notice presented the following issues:

(1) the scope of the review under § 56D, including such issues as the relationship to avoided cost, impacts on ratepayers, and tying the level of scrutiny to the

(continued...)

scope of the Department's standard of review for municipal light departments' contracts for the supply of electricity under G.L. c. 164, § 56D is set forth below.

B. Massachusetts Attorney General

The Massachusetts Attorney General asserts that the Department may make a determination that a contract filed under § 56D is cost-effective, that is, that the expected present value of the contract payments is less than the expected present value of the costs of pursuing other resource options (Massachusetts Attorney General Brief at 15, 16-17, citing New England Power

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(...continued)

size of a municipal or to the amount of the purchase as a percentage of the municipal's overall power supply;

(2) Department filing and format requirements for § 56D petitions;

(3) the standard of review;

(4) the burden of proof;

(5) the appropriate evidence necessary for an adequate Department review;

(6) the relationship of purchase agreements submitted for Department approval under § 56D to regularly filed demand forecast/supply plans and to rejected demand forecast/supply plans;

(7) appropriate non-price factors to consider in a review of a purchase agreement;

(8) the relationship of the § 56D standard of review to the Department's least cost standard as applied to supply plans;

(9) appropriateness of avoided cost as a means of assessing the economic benefit of a proposed purchase agreement;

(10) appropriateness of market-based tests as a means of assessing the economic benefit of a proposed purchase agreement;

(11) the propriety of a rulemaking procedure and/or legislative action in relation to the Department's determination of the § 56D standard of review.

Company, et al., D.P.U. 86-247, at 19 (1987)). The Massachusetts Attorney General states that this standard of review considers the proposed contract's impact on ratepayers, and may also be tailored to analyze the contract's impact upon the utility's overall resource mix, costs, and, therefore, rates (id. at 16).[1]

Noting that the Department has the authority to either approve or reject proposed municipal purchase power contracts "as the public interest requires," the Massachusetts Attorney General states that the public interest requires utilities to select resources that are "least cost to society" (id. at 5-6). Although he recognizes that the Department's least cost standard has been developed in the context of proceedings concerning investor-owned utilities ("IOUs"), the Massachusetts Attorney General, citing Taunton Municipal Lighting Plant, D.P.U. 90-65, at 56 (1991), argues that the standard also applies to the resource acquisition proposals submitted by municipal light departments (id. at 6-7). The Massachusetts Attorney General asserts that application of such a standard requires neither a rulemaking nor legislation as long as the Department provides a reasoned explanation for its decision (id. at 13-14, citing Boston Gas Company v. Department of Public Utilities, 405 Mass. 115, 121 (1989); Massachusetts Electric Company v. Department of Public Utilities, 383 Mass. 675, 681 (1981)).

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[1] The Massachusetts Attorney General posits that the Department could require a lesser initial showing for contracts constituting a small percentage of a utility's capacity (Massachusetts Attorney General Brief at 16).

According to the Massachusetts Attorney General, under the Department's least-cost standard, § 56D contract review will require an examination of the reasonableness of the payments with respect to the costs of alternative resources, the adequacy of the individual municipal utility's demand and supply forecasts, and the utility's efforts to identify and pursue demand management resources (id. at 15).[1] The Massachusetts Attorney General advocates application of the Department's Integrated Resource Management ("IRM") non-price factor scoring criteria, including environmental externality values, in § 56D contract review (id. at 18-19).

With respect to the relationship between forecast/supply plans and contract review, the Massachusetts Attorney General asserts that municipal utility power contracts should be consistent with, if not incorporated within, the regularly filed demand forecast/supply plans of municipals seeking approval of such contracts (id. at 18). The Massachusetts Attorney General asserts that meeting the power contract approval standard under G.L. c. 164, § 56D necessarily entails a finding that the least-cost supply plan standard under G.L. c. 164, § 69I has, in all material aspects, been satisfied (id. at 19, quoting Fitchburg Gas & Electric Light Company, D.P.U. 86-202/203/204 (1987)). In situations where no approved or pending demand

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[1] The Massachusetts Attorney General argues that the public interest standard of G.L. c. 164, § 56D must reflect the evolution of the Department's resource acquisition review and approval policies and practices (id. at 8-9).

forecast/supply plan exists, the Massachusetts Attorney General states that the municipal utility must provide the Department with a showing regarding need and costs that establishes the cost-effectiveness of the proposed contract (id. at 18). The Massachusetts Attorney General asserts that, in the absence of a forecast/supply plan for the Department to review, the Department would experience difficulty in determining whether a proposed contract is a least-cost option (id.).

C. CLF

According to CLF, the last two sentences of § 56D establish a two-tiered review process which is more thorough than the competitive bidding procedures for other municipal contracts set forth earlier in § 56D, due to the far greater cost that most power purchase contracts entail (CLF Brief at 8[2]). CLF contends that the first sentence of the statute stating that purchase power contracts "shall be subject to the approval of the [Department]," requires the Department to conduct a review of all municipal electric power contracts, regardless of duration (id. at 8-9). CLF states that unless the public interest standard in the second sentence is interpreted to apply to all contracts, including those for less than three years, the Department would have no standard of review for short-term

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[2] Before addressing contracts for the supply of electricity, § 56D sets forth procedures for contracts for equipment, supplies or materials in the amount of $10,000 or more. G.L. c. 164, § 56D. The statute requires requests for proposals through public advertisement and public opening of proposals. Id.

contracts (id.). CLF asserts that caselaw and Department precedent establish substantial supervisory authority over municipal utilities (id. at 13, citing, Holyoke Water Power Company v. Holyoke, 349 Mass. 442, 445-46 (1965); Municipal Light Commission of Peabody v. Peabody, 348 Mass. 266, 267, 271 (1964); Braintree Electric Light Department, D.P.U. 90-263 (1991); Reading Municipal Light Department, D.P.U. 85-121/85-138/86-28-F (1987); Groveland Municipal Light Department, D.P.U. 18708 (1977)).

CLF argues for application of a standard of review to determine cost-effectiveness similar to that applied to IOUs under G.L. c. 164, § 94A (id. at 19-20). CLF states that municipal utility power purchase agreements must be analyzed in the context of the Department's existing least-cost planning policies and the peculiarities of municipal utility structure (id. at 10). CLF asserts that the Department's public interest review standard under G.L. c. 164, § 56D and its least-cost planning policies call for an examination of municipal power contracts that is at least as rigorous, and possibly stricter, than that applied to IOU purchases (id. at 11). CLF contends the Department, in implementing the public interest standard, should recognize that municipal utilities are less able than IOUs to perform sophisticated economic analyses of potential sources of energy and capacity (id. at 11-12 (noting Energy Facilities Siting Board has rejected the supply plans for nine of the 11 municipals in this case)).

With respect to the relationship between forecast/supply plans and contract review, CLF contends that least-cost review would include having an approved, up-to-date forecast and, if the forecast identified need, a thorough optimization of supply resources (id. at 32).

In addition, CLF advocates as part of a least-cost review, the application of environmental externality values by the Department in its review of the Newbay contracts for the following reasons: (1) they are easy to apply, and require virtually no administrative resources; (2) review of municipal utilities' long-range forecasts must take environmental impacts into account; (3) application of externality values is prudent in the event new federal regulations addressing pollutants are implemented; and (4) the Newbay plant may pose a more serious air pollution threat to Massachusetts than to any other state (id. at 35-36).[1]

CLF asserts that, additionally, due to the poor performance of the municipal utilities in implementing broad-scale, cost-effective conservation and load-management ("C&LM") programs, the Department should require each of the municipal utilities to demonstrate that it is achieving its maximum energy-efficiency potential before approving the proposed purchase power contracts (id. at 24). CLF advocates this

[1] In the alternative, CLF argues for inclusion of environmental effects through general percentage increases to the contracts or application of a weighing and ranking system (CLF Brief at 36).

approach for several reasons: (1) the low C&LM implementation costs reported by utilities that have performed rigorous monitoring and evaluation; (2) the newly imposed requirements of the Clean Air Act; (3) the fact that municipal utilities have no shareholders and, thus, no concern for lost profits; and (4) the potential for C&LM to create significant employment opportunities in the Commonwealth (Id. at 24-25).

Finally, CLF contends that legislation is not required for the Department to apply the standard of review it advocates (Id. at 38).

D. Newbay

According to Newbay, the language in G.L. c. 164, Supreme Judicial Court of Massachusetts decisions, and Department Orders "clearly" indicates that the Department has limited jurisdiction over municipal utilities (Newbay Brief at 4; Newbay Reply Brief at 5-10). Newbay asserts that municipal utilities are to be accorded great deference by the Department, and if the municipals' decisions are based upon reasonable decision making and good faith, contracts submitted under §56D should be approved by the Department (Newbay Brief at 20; Newbay Reply Brief at 7, 9).

Newbay argues that portions of G.L. c. 164 that pertain to municipal utilities indicate legislative concern that proper procedures be followed by municipals and that Department jurisdiction is secondary and narrow (Newbay Brief at 4-7; Newbay Reply Brief at 13). Newbay asserts that the Department has

expressed deference toward municipals in past actions (Newbay Brief at 9-10, citing, New England Power Company, et al., D.P.U. 86-247 (1990); New England Power Company, et al., D.P.U. 1204 (1982)). Newbay cites a Supreme Judicial Court case in arguing that the Department should defer to the decision making of municipal officials (id. at 10-11, citing Board of Gas and Electric Commissioners of Middleborough v. Department of Public Utilities, 363 Mass. 433, 438 (1973)).

Newbay asserts, therefore, that the appropriate standard of review under § 56D is whether a municipal lighting plant acted in good faith and reasonably, based on facts known at the time the municipal decided to enter into the contract (id. at 11-13, 20 n.13, 22). Citing Department precedent, Newbay argues that the Department has indicated that, in assessing a utility's decision making, it will not substitute its judgment for that of the utility and that it will evaluate the decision based on the utility's knowledge at the time it was made (id. at 11-12, citing, Destec Energy, et al, D.P.U. 92-46, at 4 (1992); EUA Power Corporation, D.P.U. 92-38, at 5 (1992)).

Accordingly, Newbay states that the Department should not engage in a detailed review of the merits regarding the factors that could have been taken into consideration by the Municipals (id. at 12-13; id. at 15 (noting Department's streamlined 60-day review of qualifying facility ("QF") contracts of IOUs)). Rather, Newbay asserts that the Department can review: (1) the reasonableness of the decision making, or if a municipal cannot

demonstrate that its decision making was per se reasonable, then, (2) the reasonableness of the power purchase contracts (id. at 13 n.10).[11] Newbay argues that the Department should take into account the relative size of the municipal utility and the magnitude of a particular purchase in determining whether the municipal lighting plant's decision constitutes a reasonable exercise of discretion (id. at 21). Newbay states that, where appropriate, the calculation of avoided cost can be a factor considered by municipals in the reasonable exercise of their judgment (id.).

With respect to the relationship between forecast/supply plans and contract review, Newbay asserts that no statutory link exists between the approval of a long-range forecast under G.L. c. 164, § 69I and the approval of power contracts under G.L. c. 164, § 56D (id. at 23-24; Newbay Reply Brief at 13).[12] Newbay argues that since a decision to enter into a power contract and the evaluation of that decision must be based upon information available at the time the municipal utility makes its

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[11] Newbay argues that the municipal utility's decision making is irrelevant where a contract is shown to be cost-effective when executed (Newbay Brief at 13 n.10). Newbay further argues that an examination of the cost-effectiveness of a contract is not necessary where the decision to enter into the contract is demonstrated to have been made in good faith (id.).

[12] Newbay also argues that the merger of the Energy Facilities Siting Council and the Department does not support an exercise of additional Department jurisdiction over municipal utilities (Newbay Brief at 16-17; Newbay Reply Brief at 13 n.7).

decision, the potential time lags between the preparation of a forecast/supply plan, review of the plan, and contract formation make the relevance of forecast/supply plans a matter of timing (Newbay Brief at 24). According to Newbay, while a forecast/supply plan may be probative in determining the reasonableness of a decision to enter into a contract for the supply of electricity, if the decision is generally consistent and proximate in time with the plan, then the decision is "clearly" supported (Id.).

Newbay argues that the least-cost standard applies to municipals only in the context of reviews of demand forecasts and supply plans under G.L. c. 164, § 69I (Id. at 25; Newbay Reply Brief at 5-10). Newbay argues that IRM is inapplicable to municipals (Newbay Brief at 16, citing Final Order on Rulemaking, 21 DOMSC 91, 104 (1990); Newbay Reply Brief at 11-12). Newbay further argues that the Department's environmental externality values do not apply to municipals (Newbay Brief at 16, citing Environmental Externalities Order, D.P.U. 91-131, at 1 (1992); Integrated Resource Management Order, D.P.U. 89-239 (1990); Newbay Reply Brief at 11). Newbay also asserts that the propriety of considering non-price factors is left to the municipals and the Department should not substitute its judgment for that of the municipals (Newbay Brief at 25).

E. Municipals

The Municipals state that the Department's scope of review under G.L. c. 164, § 56D is limited by the overall statutory

scheme governing municipal light plant ownership and operation found in G.L. c. 164, §§ 34-69A (Municipals' Brief at 2, 21-22). The statutory scheme articulated in G.L. c. 164, §§ 34-69A, according to the Municipals, limits the Department's involvement in municipal utility matters to the specific instances set forth in the statute (id. at 2-3). The Municipals also argue that G.L. c. 164, § 56D is part of a larger group of "procurement" statutes, where deference is generally accorded to the formation of contracts by municipal utilities, and thus, a limited scope of review by the Department is appropriate (id. at 3-4).

Furthermore, according to the Municipals, the Department's own actions -- including not reviewing contracts or approving them with little investigation and no written order -- support a limited Department role (id. at 5, 23, 25-26 (citing instances where the Department stamped contracts "approved" or approved municipal contracts with little discussion in the context of cases involving large cumulative purchases by IOUs and municipals)). The Municipals assert that Department Orders and Supreme Judicial Court decisions have also reaffirmed the Department's limited role in reviewing municipal light plant actions and highlight the deference given to municipal light plant management decisions (id. at 8, 12, 18-19 (citations omitted)).

The Municipals state that if the Department adopts a "generic" standard of review of power purchase contracts, at an "absolute maximum," the standard can require municipal utilities

to demonstrate no more than that their contracts are below the avoided cost of a "generic" supply-side resource at the time of contract formation (id. at 5, 24-25). The Municipals suggest, however, that a lesser reasonableness standard is warranted in light of the legislative intent behind § 56D and the general statutory scheme found in G.L. c. 164 governing municipal light plant operations (id.). Additionally, the Municipals assert that since the Municipals have "substantially and reasonably" relied upon the standard of review as it existed upon entering into their contracts, then any change would require new legislation followed by a generic proceeding involving all municipal light plants (id. at 7, 32-34). The Municipals suggest that where no regulatory action is taken within 60 days, in accordance with the Department's regulations in 220 C.M.R. 8.03(2), the contract should be deemed approved (id. at 37-38 (discussing the Department's procedures for QF contracts of IOUs)).

The Municipals, noting that the Legislature explicitly linked forecast/supply plan review and the construction of facilities in the siting statute, assert that if linkage of forecast/supply plan review to § 56D had been intended, the Legislature would have written such language into the statute (id. at 39-40; Municipals' Reply Brief at 16-17, 19). The Municipals further contend that legislation merging the Energy Facilities Siting Council ("EFSC") and the Department does not alter the Department's pre-existing authority (Municipals' Brief at 40-41). Accordingly, the Municipals argue that no statutory basis exists

for linking § 56D contract reviews and the forecast/supply plan reviews that occur under the siting statute (id. at 40).

With respect to application of the G.L. c. 164, § 94 least cost standard to municipals, the Municipals reason that because the Department and EFSC promulgated extensive rules regarding IRM without notifying municipal light plants, and because IRM regulations specifically exempt municipal light plants, it would be a violation of the Municipals' due process rights to apply IRM, environmental externalities, and QF bidding requirements to municipal power purchase contracts (id. at 32; Municipals' Reply Brief at 5-7, 13-14). Furthermore, the Municipals argue that adoption of non-price considerations would be inconsistent with statutory, Departmental, and Supreme Judicial Court precedent (Municipals' Brief at 41 (noting that 220 C.M.R. 8.00 and 10.00 are inapplicable to municipals); Municipals' Reply Brief at 20).

F. EOEA

EOEA states that the Department has broad authority to review municipal electric power purchase contracts under G.L. c. 164, § 56D (EOEA Comments at 1). EOEA urges the Department to examine the Newbay contracts under the framework established by G.L. c. 164, § 94 and the Department's least-cost planning policies to ensure that the proposed power purchase contracts are in the public interest (id.). Furthermore, EOEA "strongly encourages" the Department to review the Newbay purchase power contracts in light of the environmental externality values adopted by the Department (id. at 2).

G. Rhode Island Attorney General

The Rhode Island Attorney General states that the Department should review contracts submitted pursuant to § 56D to determine whether they meet a present day avoided cost test (Rhode Island Attorney General Comments at 2). The Rhode Island Attorney General contends that this will enable the Department to determine whether contracts are the least cost purchase power alternative (id.).

III. ANALYSIS AND FINDINGS

The general statutory scheme of G.L. c. 164 which governs the Department's authority over IOUs and municipal light plants distinguishes between the two. See, e.g., G.L. c. 164, § 1 (definition of electric company does not include municipals); G.L. c. 164, § 76 (source of supervisory authority over IOUs generally inapplicable to municipals); 220 C.M.R. §§ 8.00, 9.00, 10.00 (resource acquisition regulations applicable only to IOUs). Compare G.L. c. 164, § 94 (granting IOU ratemaking authority to Department) with G.L. c. 164, §§ 58-59 (empowering Department to investigate discriminatory rates of municipal light departments without granting ratemaking authority). There are, however, areas where the statute and regulations apply equally to municipals and IOUs. See G.L. c. 164, § 69G(4) (definition of electric company under statutes pertaining to construction of jurisdictional facilities and forecast/supply plans includes municipals); G.L. c. 164A, § 9(b)(1)(iv) (making provisions of G.L. c. 164, § 71-74, 76, 87-88, 90-91 applicable to municipal

light department members of the New England Power Pool with respect to electric power facilities); 220 C.M.R. 25.00 (billing and termination regulations expressly apply to IOUs and municipals).

In addition, the statutory framework and judicial interpretation of that framework indicate that the Department ought to defer to the judgment of elected municipal officials in many matters pertaining to management of municipal light plants. See G.L. c. 164, § 56 (indicating municipal light plant manager responsible for operation and management under direction of local officials); Board of Gas and Electric Commissioners of Middleborough v. Department of Public Utilities, 363 Mass. 433, 438 (1973) (special provisions of G.L. c. 164 applicable to municipal light boards indicate legislative deference to rates fixed by public officers acting under legislative mandate). The Department does, however, have review authority over certain actions of municipal light plants and, while it will defer to the judgment of municipal officials, the Department cannot ignore its oversight responsibilities. See Bertone v. Department of Public Utilities, 411 Mass. 536, 548 (1992) (light plant discretion to alter rates not unlimited and Department has statutory power to regulate); Holyoke Water Power Company v. Holyoke, 349 Mass. 442, 446-47 (1965) (Department has substantial supervisory powers over municipally-owned plants).

Section 56D reflects the distinction in treatment of IOUs and municipals and general statutory deference to municipal

officials. Section 56D is part of a series of procurement statutes as the Municipals suggest; however, the statute makes an exception from the general contract procedures for contracts for the supply of electricity.

With the exception of the Municipals, each of the commenters has acknowledged that some review is required. We agree with Newbay and the Massachusetts Attorney General that flexibility is appropriate in § 56D review. The statute provides the Department with a measure of discretion in terms of the degree of scrutiny to be applied. G.L. c. 164, § 56D (Department need not hold hearing or issue order). We agree with the Massachusetts Attorney General and CLF that the public interest in procurement matters lies in cost-effective arrangements. However, in light of the deference to the judgment of municipal officials reflected in the statutory framework governing Department supervision of municipal light plants, we do not find that protection of the public interest under § 56D necessarily entails application of the IRM process or Department-derived environmental externality values. The Department finds, therefore, that contracts shown to be cost-effective or not otherwise contrary to the public interest would merit approval under § 56D. We recognize that there are many ways in which municipal light plants can establish that power purchase contracts are cost-effective or not otherwise contrary to the public interest.

We note the disparity in size and resources of the various

municipal light plants.[11] As a consequence of this range in size and resources and in light of the discretion conferred by the statute and the need for flexibility, the Department has set forth below a standard to promote ease of filing of contracts for the supply of electricity and expeditious review.

With respect to the relationship between contracts filed under § 56D and forecast/supply plans filed under § 69I, the Department agrees with the Municipals that there is no direct statutory link between the two. A current forecast/supply plan, however, provides a means of measuring the appropriateness of a contract. The Department finds, therefore, that consistency with a current, approved forecast/supply plan is an appropriate method of showing that power purchase contracts submitted under § 56D are not inconsistent with the public interest. However, even if a municipal has a rejected forecast/supply plan or lacks a current forecast/supply plan, a municipal could demonstrate cost-effectiveness in another manner or show that a contract is not otherwise contrary to the public interest, as discussed below.

With respect to the Department's least cost planning standards, we agree with the Municipals that in light of the specific exemption of municipal light plants from IRM, it would violate due process to require municipals to meet IRM

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[11] For example, Reading Municipal Light Department had a 1990 peak load of 118.7 megawatts ("MW") compared to Princeton Municipal Light Department which had a 1990 peak load of 3.3 MW. Reading Municipal Light Department 1990 Annual Return; Princeton Municipal Light Department 1990 Annual Return.

requirements in order to gain approval of power purchase contracts submitted under § 56D. Further, we note that municipal light departments are specifically exempted from the Department's IRM regulations.[□] While the portion of § 56D dealing with power purchase contracts is separate from the bidding requirements set forth earlier in the statute, the Department notes that bidding and competitive solicitations improve the possibility of reaching a cost-effective agreement and protecting the public interest. The Department finds, therefore, that a demonstration by a municipal light plant that a power purchase agreement resulted from a current competitive solicitation which was open to all bidders is an appropriate method of showing that a contract submitted under § 56D is not inconsistent with the public interest.[□]

The Department notes that, in addition to the two methods described above, cost-effectiveness of a power purchase agreement can be established by demonstrating economic superiority using a comparison with current supply- and demand-side alternatives. For example, a municipal light plant could compare its power purchase agreement with the results of a recent request for

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□ The Department further notes that the contracts before it in this proceeding were filed before adoption of the Department's IRM regulations and environmental externality values.

□ We note that this would not preclude a municipal from demonstrating that a narrowly focussed competitive solicitation was in the public interest. For example, such a competitive solicitation may be appropriate for diversity reasons.

proposals ("RFP") by another utility.

In addition to the methods just described, the Department finds that municipal light departments may demonstrate cost-effectiveness of power purchase contracts using other analyses. When presented with an analysis other than one of those described above, the Department will review the analysis to ensure that the contract is not otherwise contrary to the public interest.

Finally, the Department finds that it would be appropriate to approve a contract that contains provisions to protect ratepayers such as performance guarantees, buy out provisions, milestones as appropriate, and risk reduction measures, and which is:

(1) consistent with a current approved forecast/supply plan; or
(2) the result of a current competitive solicitation which is open to all bidders; or
(3) otherwise supported by a demonstration of economic superiority using current supply- and demand-side alternatives; or
(4) not otherwise contrary to the public interest.

Such an approach would be consistent with earlier cases where the Department relied on a demonstration by utilities that contracts were cost-effective under c. 164, § 94. New England Power Company, et al, D.P.U. 86-247, at 19 (1990).

IV. ORDER

Accordingly, after due notice and consideration, it is

ORDERED: That when reviewing contracts submitted to it by municipal light plants under G.L. c. 164, § 56D the Department will approve contracts which meet the standard set forth in Section III of this Order.

By Order of the Department,

Kenneth Gordon, Chairman

Mary Clark Webster, Commissioner

DISSENTING OPINION OF

COMMISSIONER BARBARA KATES-GARNICK

D.P.U. 88-265--ORDER ON STANDARD OF REVIEW

I dissent from the majority opinion interpretation of G.L. c. 164, § 56D and its view of the public interest. Although I recognize the disparity in size and resources of various municipal light plants, I do believe that the public interest requires that municipal light departments comply with the Department's least cost standards and advocate application of Integrated Resource Management non-price scoring criteria in contract review. Broadly taken, this Order represents a further erosion of the Department's focus on environmental concerns.

Respectfully,

Barbara Kates-Garnick
Commissioner